NONPRECEDENTIAL

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

TYRONE MOLYNEAUX, Plaintiff v. DANIEL R. GLICKMAN, SECRETARY U.S. DEPARTMENT OF AGRICULTURE, ROBERTA HAROLD, EVERETT BAILY, and PEDRO RAMOS, Defendants	)	CIVIL NO. 2000-0167

MEMORANDUM OPINION

Finch, Chief Judge

This matter is before the Court on the Government's Motion for Summary Judgment and Motion to Dismiss. Plaintiff opposes the motion. Defendant has filed a reply to Plaintiff's Opposition. The Court held a hearing on this matter on July 30, 2004.

I. Background

Plaintiff Molyneaux was employed by the United States Department of Agriculture (USDA) as a Community Development Specialist in October 1989. (Plaintiff's Opposition at 1.) He served as Acting Manager of the St. Croix USDA Office from approximately September1993

to March 1994, was placed on Administrative leave by the USDA from December 1996 until February 1997, and was constructively discharged by the USDA in May 1997. (Plaintiff's Opposition at 1 - 3.) Plaintiff has brought this employment discrimination lawsuit alleging that Defendants failed to promote Plaintiff, engaged in disparate treatment, violated the ADEA, discriminated against Plaintiff on the basis of sex and national origin, retaliated against Plaintiff, denied Plaintiff opportunity, put Plaintiff before the public in a false light, violated the Privacy Act of 1974, and violated the Whistleblower Statute. (Plaintiff's Complaint at ¶¶ 47 - 160.)

The Government asks the Court to dismiss certain counts of Plaintiff's Complaint and to grant summary judgment on certain counts. (Government's Motion at 1.) Plaintiff not only urges the Court to deny the Government's motion, but also asks the Court to award Plaintiff with attorney's fees and court costs. (Plaintiff's Opposition at 22).

II. Analysis

A. Rule 12(b)(6) Motion to Dismiss

In determining a Rule 12(b)(6) motion to dismiss, "the material allegations of the complaint are taken as admitted," and the Court must liberally construe the complaint in Plaintiffs' favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citing Fed. R. Civ. P. 8(f) and Conley v. Gibson, 355 U.S. 41 (1957)). All reasonable inferences are drawn in favor of Plaintiffs. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). Further, the Court must follow "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which

would entitle him to relief." Conley, 355 U.S. at 45 - 46; Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994). The Rule 12(b)(6) motion is viewed with disfavor and rarely granted. 5A Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1357 at 321 (West 1990).

Count 1 - Failure to Promote

The Government argues that because Plaintiff did not exhaust his administrative remedies, Plaintiff's 2000e-16 Claim in Count 1 must be dismissed for failure to state a cause of action upon which relief can be granted. (Government's Brief at 11.) Section 2000e-16 (c) states:

> (c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant
>
> Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

42 U.S.C.A. § 2000e-16(c). Although Plaintiff claimed to have filed four complaints with the EEOC, he did not explain if/how these complaints were resolved nor to which claim(s) these

complaints were related. At the hearing, Plaintiff was unable to show that he exhausted his administrative remedies on the failure to promote claim. Accordingly, Count 1 shall be dismissed.

Count 2 - Disparate Treatment

The Government asks the Court to dismiss Count 2 on the basis that Plaintiff did not exhaust his administrative remedies as required. (Government's Brief at 13.) Plaintiff was unable to show that he exhausted his administrative remedies on the disparate treatment claim. Therefore, Count 2 shall be dismissed.

Count 6 - Retaliation Discrimination

Because Plaintiff did not exhaust his administrative remedies, the Government argues that Count 6 should be dismissed. (Government's Brief at 9 - 10.) Plaintiff was unable to show that he exhausted his administrative remedies on the retaliation discrimination claim. For this reason, Count 3 shall be dismissed.

Count 7 - Violation of 42 U.S.C. 1983

The Government asserts that Count 7 does not state a cause of action upon which relief can be granted because Plaintiff's Complaint does not allege that federal employees were acting under color of state law. (Government's Brief at 10.) In his opposition, Plaintiff addresses this point by saying that "[t]he federal employee and Virgin Islands official acting in concert orchestrated statements that violated Mr. Molyneaux's rights." At most, Plaintiff accuses federal employees of working with territorial officials to discriminate against him. This does not amount to federal employees acting under color of state/territorial law. Accordingly, the Court

will dismiss Count 7.

Count 8 - Denial of Opportunity

The Government assumes that Count 8 could only be based upon a 42 U.S.C. § 1981 violation and that because Section 1981 does not apply to Federal employment discrimination, Plaintiff has failed to state a cause of action upon which relief can be granted in Count 8. (Government's Brief at 10.) The Court agrees with the Government's assertion. Section 1981 applies solely to "nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981 (c). Accordingly, Count 8 should be dismissed for failure to state a claim upon which relief can be granted.

Count 9 - Invasion of Privacy/False Light

The Government contends that Plaintiff has failed to state a cause of action upon which relief can be granted in Count 9 because Plaintiff did not file a requisite administrative claim and because the Government is protected by sovereign immunity. (Government's Brief at 7.) The Government advocates that Plaintiff's claim arises out of libel or slander. Plaintiff does not dispute this contention. The Government correctly points out that the Federal Government cannot be a defendant to "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights...." 28 U.S.C.A. § 2680(h). Accordingly, the Court should dismiss Count 9 because it does not state a claim that is actionable by law.

Count 10 - Violation of the Privacy Act of 1974

The Government asserts that Plaintiff's Privacy Act claim in Count 10 must be dismissed

because it is time-barred. (Government's Brief at 12.) For a complaint to be dismissed under Rule 12(b)(6) for reason that the statute of limitations provides an affirmative defense to the action, such a bar must be obvious on the face of the complaint. Bethel v. Jendoco Const. Corp., 570 F.2d 1168, 1174 (3d Cir. 1978) (citing Hanna v. United States Veterans' Administration Hospital, 514 F.2d 1092, 1094 (3d Cir. 1975)). The statute of limitations for a civil claim brought pursuant to the Privacy Act of 1974 is two years after the individual discovers the misrepresentation. 5 U.S.C. § 552a(g)(5). Plaintiff's Complaint was filed on August 16, 1999. (Complaint at 1.) In the Complaint, Plaintiff alleges that the Acting Manager of the St. Croix office disclosed personal information about Plaintiff at a hearing of the U.S.V.I. Legislature, but does not state when the hearing took place. Plaintiff does not state in the Complaint when he found out about the alleged misrepresentation either. Therefore, the Complaint itself does not establish that the statute of limitations has run on Plaintiff's Privacy Act of 1974 claim. Accordingly, the Court will not dismiss Count 10.

Count 11 - Violation of the Whistleblower Statute

At the hearing, the Government mentioned that Plaintiff failed to file an administrative claim as required by the Whistleblower Statute. Once again, Plaintiff did not show that he exhausted his administrative remedies on this claim.

B. Rule 56 Motion for Summary Judgment

Under Fed. R. Civ. P. 56, a court may grant summary judgment only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that "there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute involving a material fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether such genuine issues exist, the Court must resolve all reasonable doubts in favor of the nonmoving party. Christopher v. Davis Beach Co., 15 F.3d 38, 40 (3d Cir. 1994). The burden of proof for summary judgment lies with the moving party. Adickes v. S.C. Kress & Co., 938 U.S. 144 (1970). A trial court should not act other than with caution in granting summary judgment, and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial. Anderson, 477 U.S. at 254.

The Government purports that Plaintiff has failed to establish a prima facie case for discrimination in Counts 3, 4, and 5. In considering a summary judgment motion on a discrimination claim, the Court must consider whether there is a genuine issue of material fact in light of the established three-step, burden-shifting procedure for establishing a Title VII violation. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1993). Under that procedure, the *plaintiff* must create an inference of discrimination by establishing a prima facie case of discrimination. If he does so, the *defendant* must then "articulate some legitimate, nondiscriminatory reason for the employee's rejection". Id. at 802, 93 S.Ct. at 1824. The *plaintiff* may then attempt to show that defendant's reasons are simply a pretext for discrimination, or may present other evidence to show that discriminatory intent was more likely the cause of the employer's actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981).

To establish a prima facie case of unlawful discrimination, Plaintiff must show that (i) he belongs to a protected class; (ii) he applied and was qualified for a job for which the employer was seeking applicants; (iii) despite his qualifications, he was rejected; and (iv) after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1993).

Count 3 - Violation of ADEA

As a person over the age of 40, Plaintiff is a member of a protected class. However, Plaintiff has not shown that he was qualified for a managerial position. Therefore, Plaintiff has not met the elements of a prima facie showing under McDonnell Douglas. Accordingly, summary judgment should be granted to Defendants on Count 3.

Count 4 - Sex Discrimination

As a male, Plaintiff is not a member of a protected class. For reverse discrimination lawsuits, a plaintiff can establish a prima facie case "by presenting sufficient evidence to allow a reasonable fact finder to conclude (given the totality of the circumstances) that the defendant treated plaintiff "less favorably than others because of [his] race, color, religion, or national origin" (Iadimarco v. Runyon, 190 F.3d 151, 163 (3d Cir. 1999) (citing Furnco Const. Corp. V. Waters, 438 U.S. 567, 577, 98 S.Ct. 2943 (1978)). In the instant case, Plaintiff has presented absolutely no evidence that he was treated less favorably because he was male. Accordingly, the Court will grant Defendant's motion for summary judgment on Count 3.

Count 5 - Discrimination Based on National Origin

The U.S. Supreme Court has held that under Title VII of the Civil Rights Act of 1964, "[t]he term 'national origin' on its face refers to the country where a person was born, or, more broadly, the country from which his or her ancestors came." Espinoza v. Farah Mfg. Co., Inc., 414 U.S. 86, 88, 94 S.Ct. 334, 336 (1973). See also Jones v. United Gas Imp. Corp., 68 F.R.D. 1, 7 - 8 (E.D.Pa. 1975) (citing Espinoza, 414 U.S. at 88, 94 S.Ct. at 336). The U.S. Virgin Islands is a territory of the United States, not a separate country. Accordingly, with respect to Count 5, the Court will grant summary judgment to Defendants.

III. Conclusion

For failure to state actionable claims, the Court shall dismiss Counts 1, 2, 6, 7, 8, 9, and 11. Furthermore, the Court shall grant summary judgment to Defendants on Counts 3, 4, and 5 because no reasonable jury could find in favor of Plaintiff on these counts. The Court declines to dismiss or grant summary judgment to Defendants on Count 10. Finally, the Court shall deny Plaintiff's requests for costs and fees. An appropriate Order is attached.

ENTER:

Dated: August 11, 2004

_____

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:
Wilfredo F. Morales
Clerk of the Court

By: _____
Deputy Clerk

cc: Hon. George W. Cannon
Joseph Caines, Esq.
Ernest F. Batenga, AUSA

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IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
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ORDER

This matter comes before the Court on the Government's Motion for Summary Judgment and Motion to Dismiss, docket items # 43 and 53. In accordance with the attached Memorandum Opinion, the Court shall: (1) dismiss Counts 1, 2, 6, 7, 8, 9, and 11 of Plaintiff's Complaint for failure to state a claim upon which relief can be granted; and (2) grant summary judgment to Defendants on Counts 3, 4, and 5 of Plaintiff's Complaint for the reason that Defendants are entitled to judgment as a matter of law on these counts. Accordingly, it is hereby

ORDERED that the Government's Motion for Summary Judgment and Motion to Dismiss is **GRANTED** in part and **DENIED** in part.

ENTER:

Dated: August 11, 2004

_____
RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:
Wilfredo F. Morales
Clerk of the Court

By: _____
Deputy Clerk

cc: Hon. George W. Cannon
Joseph Caines, Esq.
Ernest F. Batenga, AUSA